THE STATE OF NEW HAMPSHIRE

COOS, SS. **SUPERIOR COURT**

No. 04-E-145

State of New Hampshire
Department of Environmental Services

vs.

Joseph and Rose Marino

ORDER ON PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONDENTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

The State of New Hampshire Department of Environmental Services ("DES") has filed a petition for a permanent injunction and civil penalties against the Joseph and Rose Marino ("the Marinos") for violations of the Comprehensive Shoreland Protection Act, RSA 483-B ("CSPA"), the Water Pollution and Waste Disposal Act, RSA 485-A ("Water Pollution Act"), and the Fill and Dredge in Wetlands Act, RSA 482-A ("Wetlands Act"). Specifically, DES seeks to enjoin the Marinos from further construction of an unauthorized residential structure, from further grading and placement of unauthorized fill, and from installing a septic system prior to approval by DES. DES also seeks an order requiring the Marinos to: (A) remove the currently unauthorized structure or to reconfigure the structure in accordance with a plan to be approved by the Commissioner of DES; (B) immediately stabilize the unauthorized fill and to permanently remove the fill by a specific date; and (C) pay civil penalties for the described violations, as set forth in the CSPA, Water Pollution Act, and Wetlands Act.

Currently pending before the Court is DES's partial motion for summary judgment, wherein DES argues that there are no disputed issues of material fact, and this Court can find, as a matter of law, that the Marinos: (1) violated RSA 485-A:32 by constructing a building from which wastes will discharge prior to obtaining a permit from DES; (2) violated RSA 482-A:3 by installing an overflow drain without obtaining a dredge and fill permit from DES; and (3) violated RSA 483-B by constructing a primary structure within fifty feet of Back Lake with out DES authorization.

The Marinos object, and have filed a cross-motion for partial summary judgment, asserting

CLERK'S NOTICE DATED
11/16/06
CC: BROOKS
Peress

that: (1) they do not need a permit under RSA 485-A:32, because the building they are constructing is not one from which sewage or other wastes will discharge; (2) DES's claim that they violated RSA 483-B:9 fails as a matter of law because RSA 483-B:10 allows the owners of nonconforming, undeveloped lots of record to build single family residential dwellings, not withstanding the requirements of the CSPA; (3) DES's claim that they violated RSA 482-A:3 by installing an overflow drain without obtaining a dredge and fill permit is a new claim not alleged in DES's petition, and therefore the Court should dismiss it; (4) DES's failure to promulgate regulations providing for review of projects under RSA 483-B:10 violates their due process rights; and finally (5) RSA 483-B:10 is unconstitutional because it gives the Commissioner of DES unfettered discretion to impose conditions without providing any meaningful objective standards.

After a thorough review of the pleadings, affidavits, and exhibits submitted by the parties, DES's motion for partial summary judgment is GRANTED in part and DENIED in part. The Marino's cross-motion for partial summary judgment is DENIED.

Standard of Review

In acting upon a motion for summary judgment, this Court is required to construe the pleadings, discovery, affidavits and all inferences properly drawn from them in the light most favorable to the non-moving party to determine whether the proponent has established the absence of a dispute over any material fact and the right to judgment as a matter of law. Estate of Joshua T., 150 N.H. 405, 407 (2003). The party objecting to a motion for summary judgment "may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue [of material fact] for trial." RSA 491:8-a, IV (1997). An issue of fact is material if affects the outcome of the litigation. Panciocco v. Lawyers Title Ins. Corp, 147 N.H. 610, 613 (2002).

Factual Background

For the purposes of this Order, the Court finds the following facts relevant, which facts are drawn from the parties' pleadings. The Marinos own property located at 68 Spooner Road in Pittsburg, New Hampshire, more particularly described on Town of Pittsburg Tax Map U-4, Lot 33-A. The property is approximately .13 acres in size, and has about 150 feet of frontage on Back

Lake. Back Lake is owned by the state of New Hampshire and is held in trust for the benefit of the public. The parties do not dispute that the property qualifies as a "nonconforming, undeveloped lot of record" as defined in RSA 483-B:10. It is also undisputed that the property, given its size and configuration, is not suitable for a state-approved septic system.

On or about October 15, 2004, the Marinos commenced construction of a single-family residential structure on the property, with the intent to move into the structure upon its completion and occupy it as their home. The structure is located between 15 and 20 feet from the edge of Back Lake. At the present date, the structure is nearly completed.

The structure contains various plumbing fixtures, including a pressure tank with pipe connections; three sink fixtures; two toilet fixtures; a shower stall; a washing machine; and a dishwasher. However, none of these fixtures are connected to an activated water source, pursuant to an Order of this Court (Vaughan, J.) dated May 10, 2005 granting DES's motion for a preliminary injunction.[1]

Prior to the Court's May 10, 2005 Order, the Marinos installed an artesian well on the property. DES claims that the Marinos installed an overflow drain for their artesian well in the bank of Back Lake, and that based on the drain's location, the installation required dredging and refilling of a trench for the drain pipe. DES emphasizes that the Marinos never obtained a dredge and fill permit for this work. The Marinos dispute DES's version of the facts. They assert that because of the well's flow rate, and in order to comply with DES's directive against connecting the residence to an activated water source, the contractor suggested that they add an overflow pipe to the system that they could rely upon to disperse excess drinking water. They further argue that the drain pipe is not within the bank of the lake.

Also preceding the Court's May 10th Order, the Marinos purchased a holding tank to collect and contain sewage and wastewater produced from their use of the residential structure. The holding tank is currently located on an adjacent piece of property. The Marinos had obtained the services of a septic designer, in order to design a septic system capable of handling anticipated discharges from the structure, however, they did not apply for or receive septic design approval

[1] The Court's Order prohibits the Marinos from occupying the residence, using plumbing, and discharging waste. The Marinos have fully complied with this Order.

from DES prior to construction.

On October 29, 2004—upon notification that the Marinos were building a structure within 50 feet of Back Lake—DES informed the Marinos by letter and telephone conversation that the residence was being constructed closer than the 50-foot setback required by RSA 483-B:9, and without an approved septic design. DES advised the Marinos to immediately cease all work on the project.

The Marinos met with DES on November 2, 2004 to discuss the construction project. At the meeting, DES staff advised the Marinos that a holding tank for septage could not be used on the property, and that they would either have to purchase additional land suitable for a state-approved septic system or make sure that the structure had no running water. At the meeting DES staff explained that projects closer than 50 feet to the water's edge must be examined by the DES Commissioner pursuant to the CSPA so that the Commissioner can impose suitable conditions, such as restrictions on the building footprint size and location. The Marinos disagreed that the CSPA applied to their property.

To this date, the Marinos have not applied for or received septic design approval from the DES, nor have they received permission from DES or its Commissioner for the construction of a single-family residence within 50 feet of Back Lake. Similarly, the Marinos have not applied for or obtained a "dredge and fill" permit or other authorization from DES for either the placement or installation of the overflow drain.

Discussion

DES's arguments can be summarized as follows. The Marinos are constructing a single-family residence located between 15 and 20 feet of Back Lake. The current location of the residence does not comply with the 50 foot setback requirement mandated under RSA 483-B:9, II(b). The residence is constructed in such a manner that it will utilize water for sinks, toilets, and other water-related fixtures. The Marinos have purchased a holding tank to retain the waste water and sewage generated from the residence. The residence is, therefore, a building from which "sewage or other wastes will discharge," and requires septic approval prior to construction, pursuant to RSA 485-A:32, I. DES maintains that had the Marinos applied for a septic permit, the application would have automatically triggered review for consistency with the CSPA. The DES

Commissioner would then have imposed conditions on the construction project that, as nearly as possible, would have met the substantive requirements of the CSPA. DES asserts that the use of a holding tank on the Marinos' property is specifically prohibited by Env-Ws 1022.03, and would not have been approved. Because no other septic system is available for the Marinos' property, DES contends that the construction of the Marinos' residence was not only commenced in violation of both RSA 485-A and RSA 483-B, but is unapprovable unless the Marinos obtain land sufficient to allow for a septic system. Additionally, DES argues that the facts reveal that the overflow drain for the artesian well is located within the "bank" of Back Lake, as that term is defined in Env-Wt 101.06. The excavation and filling needed to install the drain pipe was commenced in violation of both the CSPA and the Wetlands Act.

In response to DES's claims, the Marinos counter that they do not need a permit under RSA 485-A:32 because by using a holding tank, the residence being constructed is not a building from which sewage or other wastes will discharge. They argue that DES's claim that they violated the CSPA fails as a matter of law, because: (1) they are the owners of a nonconforming, undeveloped lot of record, and are entitled to build a single family residential dwelling on their lot, in accordance with RSA 483-B:10, I; and (2) DES cannot impose conditions under the CSPA through allegations of noncompliance with RSA 485-A:32. The Marinos also claim that DES's failure to promulgate regulations providing for review of projects under RSA 483-B:10 violates their due process rights; and that RSA 483-B:10 is unconstitutional because gives the Commissioner of DES unfettered discretion to impose conditions without providing any meaningful objective standards. Finally, the Marinos contend that they did not violate RSA 482-A:3 by failing to obtain a "dredge and fill" permit to install the overflow drain pipe. They claim that DES has failed to allege facts sufficient to prove that the pipe is located within the bank of the lake, and that installation of the pipe triggers application of the CSPA.

I. Violation of the Wetlands Act

For the sake of simplicity, the Court addresses DES's claim that the Marinos violated the Wetlands Act first. After reviewing the pleadings, affidavits, and exhibits submitted by the parties, the Court finds that disputed issues of material fact exist, which prevent the Court from ruling as a matter of law. Specifically, the parties dispute whether the installation of the drain pipe required a

"dredge and fill" permit, and whether the pipe is located in the bank of Back Lake. Consequently, DES's motion for partial summary judgment is DENIED as to this issue.

The Marinos also allege that this Court should dismiss DES's claim that they violated RSA 482-A:3 by installing the overflow drain without obtaining a dredge and fill permit, because this claim is not alleged in DES's petition. In ruling on a motion to dismiss, the Court must determine "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." Hobin v. Coldwell Banker Residential Affiliates, Inc., 144 N.H. 626, 628 (2000) (quoting Miami Subs Corp. v. Murray Family Trust & Kenneth Dash P'ship, 142 N.H. 501, 516 (1997)). This threshold inquiry involves testing the facts alleged in the pleadings against the applicable law. See Williams v. O'Brien, 140 N.H. 595, 598 (1995). Dismissal is appropriate "[I]f the facts as pled cannot constitute a basis for legal relief." Hobin, 144 N.H. at 628 (quoting Buckingham v. R.J. Reynolds Tobacco Co., 142 N.H. 822, 825 (1998)). When the Court tests the pleadings, it "assume[s] the truth of the facts alleged in the plaintiff's pleadings and construes [a]ll reasonable inferences in the light most favorable to him." Hobin, 144 N.H. at 628 (citation omitted). However, the Court "need not accept allegations in the writ that are merely conclusions of law." Konefal v. Hollis/Brookline Coop. Sch. Dist., 143 N.H. 256, 258 (1998) (quoting Gardner v. City of Concord, 137 N.H. 253, 255-56 (1993)).

Applying this standard of review, assuming the truth of the facts alleged in DES's pleadings and construing all reasonable inferences in the light most favorable to it, the Court finds that DES's allegations are reasonably susceptible of a construction that would permit recovery on this claim. Accordingly, the Court DENIES the Marinos' request as to this issue.

II. Violation of the Water Pollution Act

Next the Court addresses DES's claim that the Marinos violated Section 32 of the Water Pollution Act. RSA 485-A:32, I (2001) states, in pertinent part:

> No person shall construct any building from which sewage or other wastes will discharge or construct a sewage or waste disposal system without *prior* approval of the plans and specifications of the sewage or waste disposal system by the department.[2]

(Emphasis added).

The Marinos fervently argue that this provision does not apply to them, because "[u]se of a holding tank negates any determination that wastes will discharge from the [b]uilding." The Court finds this argument incredulous. The undisputed facts show that the Marino's structure has water-related fixtures, including sinks and toilets. The building has plumbing to accommodate these fixtures. A pressure tank has been installed and is connected to the artesian well. These facts clearly indicate that the building constructed by the Marinos is one "from which sewage or other wastes will discharge." Moreover, the Marinos do not dispute that the holding tank was purchased to collect sewage and wastewater generated by use of the building. The only logical conclusion the Court can come to is that a discharge to a holding tank is a discharge within the meaning of RSA 485-A:32, I.

Additionally, RSA 485-A:32, I plainly requires that a person must obtain DES approval of their proposed sewage and waste disposal system prior to construction of a building. Since the Marinos' building is one "from which sewage or other wastes will discharge," and they commenced construction without obtaining approval for their proposed waste disposal system, they are in violation of RSA 485-A:32, I. Accordingly, with respect to DES's claim alleging violations of the Water Pollution Act, DES's motion for partial summary judgment is GRANTED, and the Marinos' cross-motion for partial summary judgment is DENIED.

III. Violation of the CSPA

Finally, the Court addresses DES's claim that the Marinos violated the CSPA. Resolution of this issue involves a determination of the interrelationship of several statutes. Therefore, in order to effectively address the parties' claims, a comprehensive review of the CSPA is warranted.

The CSPA, originally enacted in 1991, functions as an additional layer of regulation that overlays existing state and municipal permitting schemes, such as building permits, wetlands permits, and septic system approvals. See 1991 N.H. Laws 303:1. The purpose of the CSPA is to prevent "uncoordinated, unplanned and piecemeal development along the state's shorelines, which could result in significant negative impacts on the public waters of New Hampshire." RSA 483-B:1, IV (Supp. 2005).

When the Legislature enacted the CSPA, it created certain minimum standards for the

---

[2] By using the word "department," the statute is referring to DES. See RSA 485-A:2, III (2001).

development and use of the shorelands of the state's public waters. See generally RSA 483-B:9 (Supp. 2005). These standards serve several purposes, namely to: protect freshwater wetlands; control land uses; conserve shoreline cover and access points to inland waters; preserve the state's lakes in their natural state; promote wildlife habitat; protect the public's use of waters; and to conserve natural beauty and open spaces. RSA 483-B:2 (2001).

Because development of the state's shorelands can be regulated by many different entities, the Legislature required consistency with the CSPA. RSA 483-B:I (2001) requires state agencies to "perform their responsibilities in a manner consistent with the intent of [the CSPA]." Moreover, when a state agency or a local permitting entity issues work permits within the protected area, those permits "shall be issued only when consistent with the policies of [the CSPA]." Id.

Turning to the parties' arguments, the Marinos point out that RSA 483-B:6 defines DES's role in issuing permits for work within the protected shoreland, but explain that none of the permits enumerated in RSA 483-B:6 apply to their construction project.[3] The Marinos argue that the statute does not list RSA 485-A:32 as an approval for which DES is authorized to impose conditions under the CSPA. Further, the Marinos assert that RSA 483-B:10 allows owners of nonconforming, undeveloped lots of record to build a single family residential dwelling on the nonconforming lot, notwithstanding the requirements of the CSPA, subject to conditions, which, "in the opinion of the [DES] Commissioner, more nearly meet the intent of the [CSPA]." RSA 483-B:10 (2001). They contend that the CSPA does not state the mechanism for triggering review that would lead the

---

[3] RSA 483-B:6 (Supp. 2005) provides:

> I. Within the protected shoreland, any person intending to:
>
> (a) Engage in any earth excavation activity shall obtain all necessary local approvals in compliance with RSA 155-E.
> (b) Construct a water-dependent structure, alter the bank, or construct or replenish a beach shall obtain approval and all necessary permits pursuant to RSA 482-A.
> (c) Install a septic system as described in RSA 483-B:9, V(b)(1)-(3) shall obtain all permits pursuant to RSA 485-A:29.
>
> . . . .
>
> II. In applying for these approvals and permits, such persons shall demonstrate to the satisfaction of the department that the proposal meets or exceeds the development standards of this chapter. The department shall grant, deny, or attach reasonable conditions to a permit listed in subparagraphs I(a)-(e), to protect the public waters or the public health, safety or welfare. Such conditions shall be related to the purposes of this chapter.

Commissioner to impose such conditions.

DES responds by arguing that RSA 483-B:3, I mandates that state and local permits for work within the protected shorelands shall be issued only when consistent with the policies of the CSPA, and therefore, a request for septic approval or a wetlands permit automatically triggers review for consistency with the CSPA. In addition, DES argues that no specific reference to RSA 485-A:32 is required in the CSPA because all applications for septic and waste disposal permits must meet the requirements of RSA 485-A:29, and RSA 485-A:29 is specifically referenced in RSA 483-B:6. Thus, DES argues that it is obligated to consider consistency with the CSPA whenever it engages in review of a proposed sewage or waste disposal system within the protected shoreland. Finally, DES asserts that the Marinos do not qualify for the exemption under 483-B:10, because the exemption applies only if the development is not prohibited by other law. DES contends that because the Marinos commenced construction of the residence in violation of other state law (i.e., the Water Pollution Act), the exemption does not apply.

The well-established principles of statutory interpretation instruct that statutes must be interpreted according to their plain language, focusing on the statute as a whole, not on isolated words or phrases. Transmedia Restaurant Co. v. Devereaux, 149 N.H. 454, 462 (2003). When the language used in a statute is clear and unambiguous, there is no need to examine the provision's legislative history. Merrill v. Great Bay Disposal Serv., 125 N.H. 540, 542 (1984). "A widely accepted method of statutory construction is to read and examine the text of the statute and draw inferences concerning its meaning from its composition and structure." Id. (quoting State v. Flynn, 123 N.H. 457, 462 (1983)).

The Court agrees with DES that in this case, a request of septic approval automatically triggers DES review for consistency with the CSPA. RSA 483-B:3, I (2001) clearly states that "[s]tate and local permits for work within the protected shorelands shall be issued only when consistent with the policies of [the CSPA]." Even though Marinos septic system is not one necessitating a permit under RSA 483-B:6, I(c), the building that the Marinos have constructed requires a septic permit pursuant to RSA 485-A:32, and therefore the Marinos must obtain approval according to the directives contained in RSA 485-A:29. The fact that the Marinos are building a residence on an undeveloped lot of record rather than a new lot or subdivision does not negate the

fact that the construction project is within the protected shoreland. Taking into consideration the purpose of the CSPA, the Court determines that an application for septic approval in this situation should trigger review for consistency with the CSPA.

The Marinos correctly assert that they are the owners of a nonconforming, undeveloped lot of record, and are entitled to build a single family residential dwelling on their lot.[4] However, this right is not an absolute one. RSA 483-B:10 provides that:

> Nonconforming, undeveloped lots of record that are located within the protected shoreland shall comply with the following restrictions, in addition to any local requirements:
>
> I. Except when otherwise prohibited by law, present and successive owners of an individual undeveloped lot may construct a single family residential dwelling on it, notwithstanding the provisions of this chapter. Conditions may be imposed which, in the opinion of the commissioner, more nearly meet the intent of this chapter, while still accommodating the applicant's rights.

RSA 483-B:10, I (2001). The plain language of this section gives the DES Commissioner authority to review proposed development projects and impose conditions so that the project will adhere to the requirements of the CSPA as much as possible. The "triggering mechanism" for imposition of conditions by the Commissioner would be, in this case, submission of an application for an approved septic system design, or an application for dredging and filling the bank of Back Lake. Because these applications automatically trigger review for consistency with the CSPA, the Commission would then have the opportunity to review the development project and impose appropriate conditions, carefully balancing the intent of the CSPA with the Marinos' rights.

The Court rejects the Marinos argument that RSA 483-B:10 is unconstitutional because gives the Commissioner of DES unfettered discretion to impose conditions without providing any meaningful objective standards. RSA 483-B:10, I states that the Commissioner may impose conditions that "more nearly meet the intent of this chapter, while still accommodating the applicant's rights." The provisions of the CSPA are clearly spelled out not only in the

---

[4] The Court rejects DES's argument that the exemption contained in RSA 483-B:10 is inapplicable to the Marinos, because they commenced construction in violation of "other state law." Assuming the Marinos obtained all of the proper permits to install an approved septic system—and all other permits and approvals required—they would still be entitled to build a single family residential dwelling on their property, subject to review by the Commissioner. The fact that they did not do so prior to commencing construction of the building does not render the exemption inapplicable.

administrative rules, but most notably in the statute itself. For example, RSA 483-B:9 sets forth the minimum shoreland protection standards, and requires, among other things:

(1) that primary buildings constructed within the protected area meet a 50-foot setback requirement;
(2) fertilizers other than limestone may not be used within 25 feet of the reference line of any property;
(3) that all new structures within the protected shoreland be designed and constructed in accordance with DES rules pertaining to terrain alteration under RSA 485-A:17, in order to control erosion and siltation of public waters during and after construction; and
(4) that new structures within the protected shoreland be designed and constructed to prevent the release of surface runoff across exposed mineral soils;

RSA 483-B:9, II(b) & (d); V(c)(1)-(2) (Supp. 2005).

Moreover, the Court finds that the lack of specific administrative rules regarding the submittal of forms for use in conjunction with RSA 483-B:10 does not preclude enforcement against the Marinos. First, promulgation of rules under RSA 483-B:10 is unnecessary to carry out what the statute authorizes on its face. See Nevins v. New Hampshire Dep't of Res. & Econ. Dev., 147 N.H. 484, 487 (2002) (citing Stuart v. State, 134 N.H. 702, 705 (1991)). Second, as mentioned above, the triggering mechanism for review under the CSPA would have been application for a permit to install an approved septic system. This would have provided a specific mechanism for review of the Marino's project without the need for an additional application.

Based on the foregoing analysis, and because the Marinos have constructed their residential structure within 50 feet of Back Lake without DES authorization, the Court determines that the Marinos have violated the CSPA. Accordingly, DES's motion for partial summary judgment is GRANTED as to this issue. The Marinos' cross motion for partial summary judgment is DENIED.

SO ORDERED.

Dated: January 5, 2006

Timothy J. Vaughan,
Presiding Justice